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IN THE

Supreme Court of the United States

October Term, 1947

No. .....

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

May It Please the Court:

The undersigned on behalf of Michael Downs and J. Gerber Hoofnel (and for many other ex-employees of Lockheed Overseas Corporation similarly situated) prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case, numbered therein 11,578. By general agreement, the Downs case and Hoofnel v. Commissioner (No. 11,593 in the court below) were tried together in the Tax Court, and were argued together and disposed of in one opinion in the Circuit Court of Appeals, although they were therein separately briefed [R. 96] and separate judgments were therein rendered. [R. 109.]

I.

Summary and Short Statement of Matter Involved.

1. This petition involves a construction of Section 116(a)(1) of the Internal Revenue Code as amended by Section 148a of the Revenue Act of 1942 and particularly an interpretation of the word resident as therein used and as defined in Regulations 111, Section 29.211-2. Said Section 116(a)(1), Internal Revenue Code as amended in 1942 and said Section 29.211-2 of Regulations are printed in the Appendix hereto.

2. All parties hereto and the courts below agree that in absence of any definition of "resident" in said code section as amended, we must look to said section of Regulations for such definition. [R. 62 and R. 102.] And they agree that said definition in said Regulations which treats of aliens in the United States applies equally in reverse to our citizens abroad. [R. 102-3.]

3. Petitioner on November 21, 1945, filed his petition to the Tax Court for redetermination of a deficiency of $225.79 and interest assessed against him by the Commissioner for the calendar year 1943. This deficiency arose from denial of taxpayer's claim to exemption from individual income tax for that calendar year on his overseas salary of $5,438.50 from Lockheed Overseas Corporation, while a resident of the British Isles and North Ireland within the meaning of the sections of the Code and Regulations above captioned. The cause came on regularly for hearing at Los Angeles, California, before the Tax Court on June 20, 1946.

4. The evidence at the trial disclosed that:

(a) Early in 1942 Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft

depot at Belfast, Ireland. To expedite performance, Lockheed organized a wholly owned subsidiary, Lockheed Overseas Corporation, hereinafter called L. O. C., which latter corporation contracted with the men and operated the base in Ireland. [Stipulation, Ex. 2, R. 19.]

(b) The need to overcome the lead of the German fliers was desperate. There was no time to train men in the army to meet this need. General (Hap) Arnold telegraphed to practically all big industries in the United States to release such personnel as Lockheed Overseas needed. Between the first of January and the first of July 1942, Industrial Relations Manager Messer and his assistant Osgood, recruited about 3000 men—specialized types of mechanics from industries throughout the United States. They went into engine factories in the East and even into watch repair plants for skilled instrument men. [R. 85-86.]

(c) This was not to be a mere maintenance base in North Ireland. It was rather to be and become a "modification" base. These men were to be near the flying base, to be in close touch with our bombers as they returned day after day from their sorties over Europe; to redesign and rebuild as necessary, and overcome the faults of, aircraft produced in hastily retooled automobile and other factories in this country; to determine under actual war conditions any weakness in our planes and immediately remedy same. Obviously this made the Lockheed Irish bases very much an object for bombing by German fliers. [B. W. Messer, R. 86.]

(d) Due to the nature of the project and uncertainty of the men returning, the employment force was instructed by management of the corporation to make the picture to

prospective employees as dark as possible. They were to cross the Atlantic when the submarine hazard was the greatest during the entire war. The contract stipulated that the men were more or less on their own, if taken prisoner. And the interviewers for Lockheed pointed out to these men that the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious. [R. 86.]

(e) From Jan. 1, 1942, to June 30, 1942, Michael Downs was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, Calif. Petitioner made application for foreign service on or about April 22, 1942, at Lockheed Placement Division, Burbank, California. He was then living with his wife, Eleanor J. Downs, and three minor sons, at 246 N. Ave. 49, Los Angeles, California. In May, 1942, following said application, he signed a contract with Lockheed Overseas Corporation for services in the British Isles. While the expiration date of said contract was six months, yet Downs in his application committed himself to stay over two years and longer [p. 1 of App. hereto], and the contract was extended by agreement until May 1, 1943, and then re-executed for the period of the war and such additional time as necessary for Lockheed to perform its contract with the army. Pursuant to said contract he embarked June 30, 1942, on H.M.S. Orangi, a vessel of British registry, at New York Harbor. [Stipulation, R. 15-16.] Exhibit 1 of the Stipulation omitted through error is inserted in Appendix hereto, page 1.

(f) Downs testified "Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk with anyone or use the telephones, and we stayed in that room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn't want anyone to know about it. It was an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines." [R. 83.]

(g) From Glasgow, he was taken to an R.A.F. base with nineteen other men to help them get ships into the air that had been damaged. He had battle damage crews repairing ships that were shot up—the American Air Force, the R. A. F., and Polish Air Force. He lived all over England; went through some bombings, five of them in one week. He testified: "When I went over I intended to stay until the war was over. I didn't know how long it was going to be, but I knew they needed men pretty bad. So I volunteered to go, signed my contract and went.

They asked me to stay, so I did, stayed till the last one. During 1942 and 1943 I had no way of knowing when I might return to the United States." [Michael Downs, R. 83-84.]

(h) During most of his time overseas he lived at various bases in England and Ireland. Board and lodging was provided for by either the British Army or Lockheed Overseas Corporation or the American Air Force. [Downs, R. 84.]

(i) Lockheed contracted with Downs that it would pay any tax assessed against his overseas salary by any foreign country or reimburse him therefor and the contract further provided that he could not pay any such tax without Lockheed's consent. [R. 29 and 46.] He was never asked to pay such tax nor was any tax or social security held out of his salary. [R. 85.]

(j) He returned to the United States in July 1944, arriving at New York City July 12th of that year and made his return of his 1942-43 income tax within 90 days thereafter; and on August 28, 1945, the deficiency notice shown at R. 8 was mailed to petitioner; and petition to the Tax Court for redetermination was filed therein by taxpayer on November 21, 1945. [R. 2.]

5. The cause came on regularly for hearing before the Tax Court sitting at Los Angeles, California, on June 20, 1946. It was thereupon stipulated between counsel that the cases of Michael Downs (T. C.) Docket No. 9643, and Eleanor J. Downs (his wife, T. C. Docket No. 9644) be consolidated and the court so ordered. [R. 80.]

After evidence introduced and the cause, on that day, submitted, the Tax Court, on October 25, 1946, issued its opinion and entered its decision denying petitioner's petition. 7 T. C. 1053. [R. 68-69.] Notwithstanding that Michael Downs had made a timely return and full disclosure of his overseas earnings of $5438.50 for the year 1943, the court held his wife Eleanor, liable to a delinquency penalty of 25 per cent on her half of his said overseas earnings. [R. 67-68.] Decision of the Tax Court is discussed under "Reasons for Granting the Writ." (Part IV hereof.)

6. The opinion and judgment of the United States Circuit Court of Appeals (..... F. (2d) .....) [not yet reported but set forth in full in R. 96-109] and is discussed fully in Part IV hereof under "Reasons for Granting This Writ."

7. On December 4, 1947, nearly two months before the Judgment was entered in the *Downs* case in the Ninth Circuit Court of Appeals, the Fifth Circuit Court of Appeals entered a Judgment for the taxpayer, in *Swenson v. Thomas,* 164 F. (2d) 783 [App. 4, p. 24]. A copy of that opinion was submitted by petitioner and received by the Ninth Circuit prior to its decision herein. Although the facts in these two cases are in all vital matters alike, the Ninth Circuit summarily refused in any way to reconcile the two cases. [R. 107.] A full copy of the decision in *Swenson v. Thomas*, 164 F. (2d) 783, is set forth in the Appendix hereto, and fully discussed in Part IV hereof. Briefly the facts are as follows:

(a) Swenson was born in El Campo, Texas, where his mother still lives, and where he always claimed his domicile to be. Graduating from the University of Illinois he became a geophysicist and on August 28, 1941, he entered into a written contract with his employer to enter into its foreign service for three years for a salary, a bonus and living expenses while outside of the United States. The agreement was terminable by either party on thirty days' notice. He was sent to Colombia, South America, to prospect for oil in charge of a crew of laborers in the forest and jungles. His contract was renewed for an additional year; so he was in Colombia for four years, including all of both 1943 and 1944. He expected all the time to return to the United States when the work was done, and in his application for passport stated he expected to return in three years. He paid income taxes while in Colombia to that government. No income taxes had been required of him by the United States while he was in foreign service. But upon his return to this country respondent Commissioner claimed a tax for the year 1943 despite the fact that he had paid a tax to Colombia for that same year. In this connection, it should be noted in Re Downs and the other Lockheed Overseas employees, that their contract provided that if a tax were levied by a foreign government on their overseas salary, Lockheed would pay it and reserved the right to determine its payment; and, obviously, if so paid it would be billed by Lockheed to the army as part of the expenses of the Belfast Base and ultimately the bill paid by the United States Treasury Department. [Recitals R. 19 and 35.]

II.

Basis of Jurisdiction of the United States Supreme Court to Review the Judgment.

1. STATUTORY PROVISIONS.

(a) The statutory authority upon which it is contended that this court has jurisdiction to issue a writ of certiorari and review the judgment in question is Section 240(a) of the Judicial Code as amended 43 Stat. 938 (28 U. S. C. A., par. 347a).

(b) Section 1141(a), Internal Revenue Code (Public Act No. 1, Seventy-Sixth Congress, as amended by Public Laws enacted subsequent to February 10, 1939).

2. DATE OF JUDGMENT.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit sought to be reversed was rendered on January 27, 1948. Petitioner did not file a petition for rehearing. A petition for a writ of certiorari presented to this Honorable Court within three months thereafter is in time (28 U. S. C. A. 350), *American Ry. Exp. Co. v. Levee,* 263 U. S. 19, 21, 44 S. Ct. 11, 68 L. Ed. 140.

3. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(a) Section 1141, Internal Revenue Code (26 U. S. C. A. 641), provides that judgments of the Circuit Court of Appeals upon review of decisions of Board of Tax Appeals shall be subject to review by the Supreme Court by certiorari, in the manner provided by Section 240 of the Judicial Code.

(b) *Wm. R. Staats Co. v. Security Trust and Savings Bank* 243 U. S. 121; *Douglas v. Willcuts,* 296 U. S. 1, 80 L. Ed. 3.

4. GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

(a) The questions presented herein are of nationwide importance because the decision here complained of has wide implications affecting our national revenue from individual income tax. It is conceded by respondent and the Tax Court and the Ninth Circuit that inasmuch as Section 116, Internal Revenue Code, does not define the meaning of the term resident that Treasury Regulations 111, Section 29.211-2 must be looked to to find the correct interpretation of that word. Opinion of Tax Court. [R. 62.]

(b) In its opinion in the instant case the Ninth Circuit Court of Appeals says "all parties to the appeal agree that Regulation 111, Section 29.211-2 shall be specially considered (citing the section in footnote). This regulation specifically relates to aliens in the United States and what circumstances constitute residence. The principles of this regulation are applicable to United States citizens present in foreign countries on the question of residence. [R. 102-3.]

(c) This Section 29.211-2 very broadly defines the term resident. It particularly clears up the confusion that has so much confounded many counsel and courts as to the difference between domicile and residence—a confusion that runs repeatedly through the decision here questioned. The section says:

> ". . . One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the

purpose for which he came has been consummated or abandoned."

(d) The above provision is so broadly and carefully phrased that its construction seems obviously intended to tax aliens even temporarily in this country upon their income earned here for the whole of a taxable year the same as our own citizens. They need not be domiciled here; there is nothing in this section of Regulations that prescribes that they have to establish a home here and maintain such establishment and take on corresponding obligations or identifying themselves in some degree with our customs and live under and with our customs. And yet this is the prescription that the Ninth Circuit Court exacts in the Downs case. [R. 105-106.] Under this narrow twist given our Regulations, respondent and our Treasury would lose a large amount of revenue that is justly due us. As one example of this: while this case was on appeal, a broadly published interview with the famous movie and radio actress Carmen Miranda related how the bulk of her high income in the United States went to our income tax, whereas her tax in her own country, Brazil, would be very small. If the decision of the Ninth Circuit in the Downs and Hoofnel cases, instead of that of the Fifth Circuit in the *Swenson* case prevails, it will open the door wide for many movie and radio aliens now and hereafter to easily and legally deprive our Treasury of vast sums of money to which we are legally and justly entitled.

(e) This Honorable Court has always recognized that questions similar to those presented here arising under Federal Revenue laws were substantial and fully justified granting of certiorari therefor.

"A writ of certiorari was granted by this court, as the decision was said to be of grave importance to

the administration of the new revenue laws. 263 U. S. 692, 68 L. Ed. 509, 44 Sup. Ct. Rep. 6."

United States v. Johnson, 268 U. S. 220, 69 L. Ed. 925.

III.
The Questions Presented.

1. What does Section 116(a)(1), Internal Revenue Code, mean by "resident"?

2. Do the words "bona fide" limit the discretionary power of the Commissioner in determining whether or not the citizen is a resident to his satisfaction; or does he have the authority by the statute to determine residence regardless of the good faith of taxpayer?

3. Do Regulations 111, Section 29.211-2 [R. 64] defining the term resident as used in the statute control the discretionary power of the Commissioner or does he have power to disregard the definition of resident in said section?

4. Can said Section 29.211-2 be construed to mean that a United States citizen must establish a home, maintain his establishment and take on corresponding obligations of the home in a foreign country to become a resident under said section? [R. 105.]

5. Does such citizen not only have to make his home temporarily in the foreign country but also identify himself in some degree with the customs and live within such customs of the country in which he is staying temporarily to comply with said Section 29.211-2? [R. 106.]

6. Was Section 116(a)(1) amended in 1942 so as to reach American technicians abroad? [R. 105.] Or was it amended to prevent easy evasion of the section as it previously stood?

IV.

Reasons Relied on for the Granting of the Writ.

1. The Circuit Court of the Ninth Circuit in this, the Downs case, has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; the latter decision being in the Fifth Circuit in *Swenson v. Thomas,* decided December 4, 1947. Reported in 164 F. (2d) 783. A copy of this *Swenson* decision is appended in the Appendix hereto, page 24. The two cases raise the same important question, namely a proper construction of the term resident as used in Internal Revenue Code 116(a)(1) and as defined in Section 29.211-2 of Regulations 111. Respondent and the courts below in the *Downs* case agree that in absence of any definition of the term "resident" in Section 116, Internal Revenue Code, we look to said Section 29.211-2 therefor.

2. The facts in the two cases are very similar, as indicated in Part I of this petition:

(a) Both taxpayers were at all the times in question admittedly domiciled in the United States;

(b) Both went to foreign countries while the 1942 income tax laws of this land were in force;

(c) Both at all times, while abroad, intended to retain their citizenship in the United States;

(d) Both intended to return to this country when the purpose for which they went abroad was consummated or abandoned.

(e) In other words, both went abroad temporarily—Swenson in his application for his passport stated he intended to stay overseas for three years. His contract was for that time, but was extended for an additional year

but provided for cancellation by either party on thirty days notice. Downs in his application to and contract with Lockheed agreed and intended to stay overseas for the duration of the war and such additional time as necessary for Lockheed Overseas Corporation to perform its contract with our Government.

(f) Both because of the nature of their employment were in no position to establish and maintain an individual home abroad in the ordinary sense of that word, and both were provisioned by the employer. It seems immaterial that the housing and provisioning had to be necessarily different because Swenson lived in forest and jungle, while Downs, some of his time lived near Belfast, Ireland, where he and his three thousand and more fellow employees could hardly find little Irish cottages to live in.

(g) Both were technicians, Swenson probably more so than Downs for the former was a university trained geophysicist exploring for oil in South America and Downs was a skilled mechanic. It is immaterial whether or not these men were technicians. The law was not amended for the purpose of taxing technicians abroad. But, on the contrary, was amended to prevent tax evasion by any or all citizens through the simple expediency of absenting themselves for more than six months in any one year. For proof of this, we simply have to turn to the report of the Senate Committee on Finance, C. B. 1942-2, pp. 548, 549, which states in part as follows:

> ". . . This provision of the present law has suffered considerable abuse, in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes."

(h) Both were taxed by the Commissioner on their 1943 overseas salary; that official predicating Downs tax

on the fact he had not paid income tax to Britain or North Ireland and taxing Swenson in spite of the fact he had paid such a tax to Colombia. But of course payment of a tax by an American citizen to a foreign county while he is in that country would depend upon the wording and intent of the foreign taxing statute—not on our own Internal Revenue Code. The British Irish statute might read one way; the Colombia statute another. We once had in our own revenue law a provision taxing domestic earnings by an alien regardless of his residence here. And as to Downs, his Lockheed contract provided that that corporation had the right to determine (and pay) his tax to a foreign country. So the payment or non-payment of such a tax would not be evidence of his intent as to residence abroad.

3. As to both citizens, the Commissioner and the courts below agree that we should look to Section 29.211-2 of Regulations 111 for definition of the term "resident."

In the Downs case, the Ninth Circuit Court of Appeals, after admitting it should look to said Section 29.211-2 [R. 102] insists that to "enjoy the exemption" the American citizen establish a home, maintain his establishment and take on corresponding obligations of the home in any foreign country [R. 105]; the Ninth Circuit also holds that Section 116(a)(1), Internal Revenue Code, is intended "to reach technicians" because Senator George said so in a hearing before a Senate Committee [R. 105]; said court holds that "Section 29.211-2 unquestionably is drawn with the understanding that unless the United States citizen abroad 'makes his home temporarily' in the foreign country, that is, as we see it, identifies himself in some degree with the customs and lives under and within such customs, he is not a resident of the foreign country in which he is staying temporarily."

4. The best answer to the above opinion of the Ninth Circuit is to quote freely from the decision of the Fifth Circuit in *Swenson v. Thomas,* 164 F. (2d) 783 [App. hereto, pp. 26-27], which says:

> ". . . He did not change his citizenship, nor does the law contemplate that. The exemption was expressly made for citizens of the United States. The law says nothing of domicile, or changing that. Domicile is not changed by foreign residence so long as there is an intention to return home. Swenson in applying for his passport stated his domicile was in the United States; and he has never changed it. But notwithstanding the fact that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him to be ever on the move, it remains true that he was always living in Colombia, attending to his business there; and that we think constitutes residence there.
>
> The Regulation above referred to makes no difficulty. It excludes 'a mere transient or sojourner,' and correctly. A transient means literally 'one going across,' or passing through. 'Sojourner' is built around the French word 'jour,' meaning a day, and signifies a mere temporary presence or visit. The Regulation continues: 'A mere fleeting intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States (or Colombia) and has no definite intention as to his stay he is a resident. One who comes to the United States (or Colombia) for a definite purpose which in its nature may be promptly accomplished he is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States (or Colombia) he becomes a resident, though it be his

intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.' . . . Making his 'home temporarily' in Colombia does not mean necessarily buying a house or changing his domicile. It means no more than living there temporarily, though his business requires him to move from place to place."

5. In support of our above petition for certiorari, we submit the following citations:

"Certiorari was granted (296 U. S. 557, *post* 393, 56 S. C. 106) because of the conflicting decision of the Circuit Court of Appeals for the Seventh Circuit in Commissioner of Internal Revenue vs. McIlvaine, 78 Fed. 2d 787, 102 A. L. R. 252 (296 U. S. 488, *post* 345, 56 S. C. 332)."

United States Trust Co. v. Commissioner of Internal Revenue, 296 U. S. 481, 482, 80 L. Ed. 340.

"The Board of Tax Appeals reversed, holding that Section 302(d) did not apply. The Circuit Court of Appeals affirmed the Board's decision. We granted the writ of certiorari *because the decision below conflicts with that in another circuit.*" (Emphasis added.)

Helvering v. City Bank Farmers Trust Co., 296 U. S. 85, 87, 80 L. Ed. 62.

"We granted certiorari because of a conflict of decisions as to the distinction between an 'association' and a 'pure trust' the decisions being described in one of the cases as 'seemingly in a hopeless state of confusion.'"

Morrissey v. Commissioner of Internal Revenue, 296 U. S. 344, 80 L. Ed. 293.

6. As a further reason why this writ should be granted, we submit that in this case of Downs vs. Commissioner, the United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be settled by this court, particularly because of the narrow construction given to the term resident as defined in Section 29.211-2 of Regulations 111.

Conclusion.

For the reasons above assigned, petitioner prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT A. WARING,
Attorney for Petitioner.

LAWRENCE M. CAHILL,
Of Counsel.

State of California, County of Los Angeles—ss.

Robert A. Waring, being first duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true. Counsel further certifies that the petition is well founded, and is not interposed for delay.

ROBERT A. WARING.

Subscribed and sworn to before me this 22nd day of April, 1948.

MARGUERITE F. CRIPPS,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires January 3, 1952.

APPENDIX 1.

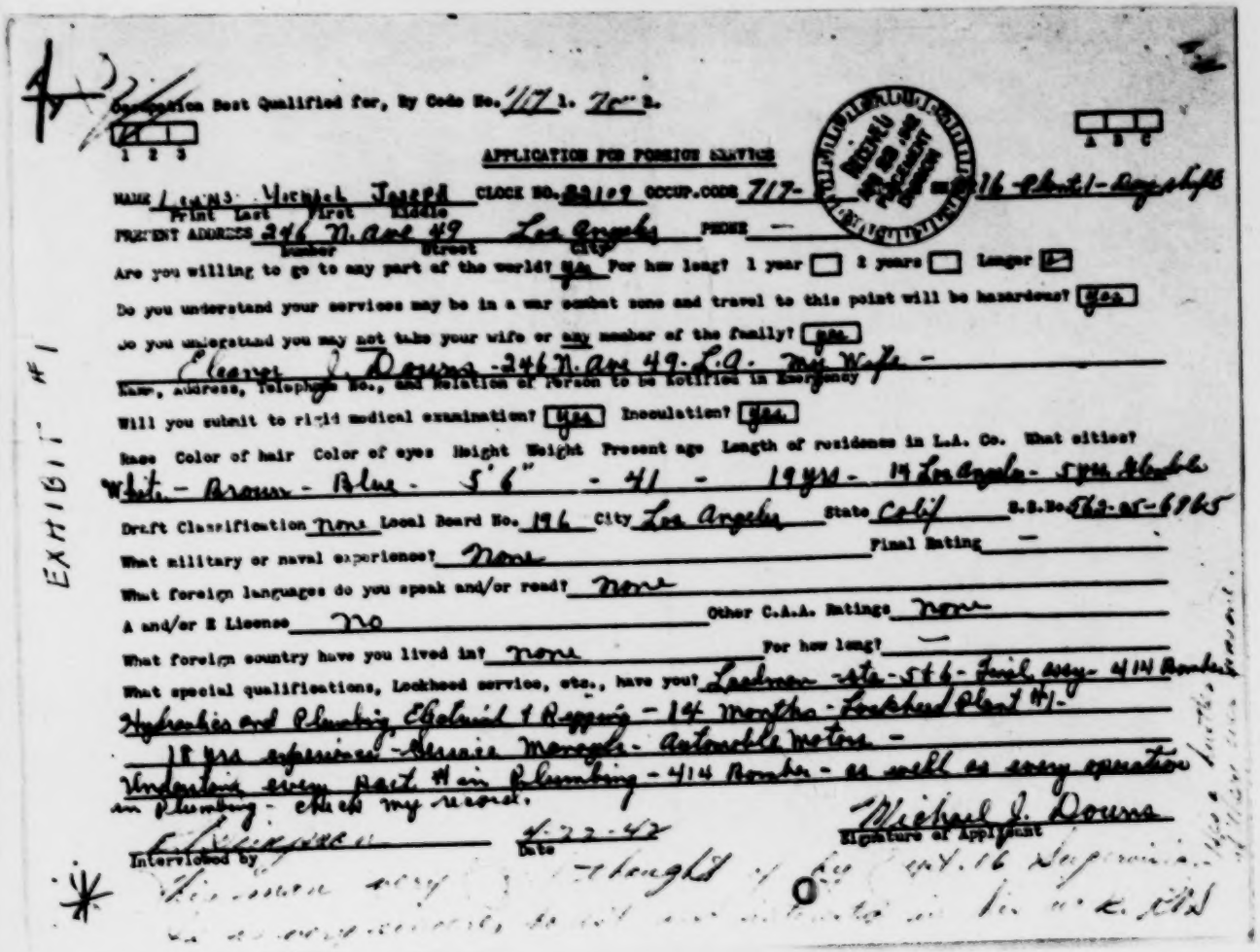

EXHIBIT #1

Occupation Best Qualified for, By Code No. 117 1. None 2.

1 2 3

APPLICATION FOR FOREIGN SERVICE

A B C

NAME (Print) Last: Vietnick First: Joseph Middle: CLOCK NO. 88109 OCCUP. CODE 717- [illegible] 16-Shtl-Angeles

PRESENT ADDRESS 246 N. Ave 49 Los Angeles PHONE —
Number Street City

Are you willing to go to any part of the world? Yes For how long? 1 year ☐ 2 years ☐ Longer ☑

Do you understand your services may be in a war combat zone and travel to this point will be hazardous? Yes

Do you understand you may not take your wife or any member of the family? yes

Eleanor J. Douma - 246 N. Ave 49 - L.A. - My Wife -
Name, Address, Telephone No., and Relation of Person to be Notified in Emergency

Will you submit to rigid medical examination? Yes Inoculation? Yes

Race Color of hair Color of eyes Height Weight Present age Length of residence in L.A. Co. What cities?

Wht. - Brown - Blue - 5'6" - 41 - 1941 - 14 Los Angeles - 1941 Alhambra

Draft Classification None Local Board No. 196 City Los Angeles State Calif S.S.No. 562-05-6965

What military or naval experience? None Final Rating —

What foreign languages do you speak and/or read? None

A and/or B License No Other C.A.A. Ratings None

What foreign country have you lived in? None For how long? —

What special qualifications, Lockheed service, etc., have you? Leadman - 5th - 5th 6 - Final assy - 414 Bomber
Hydraulics and Plumbing, Electrical & Rigging - 14 Months - Lockheed Plant #1 -
If yes explain: - Service Manager - Automobile Motors -
Understand every part of main plumbing - 414 Bomber - as well as every operation
on plumbing - check my record.

Interviewed by [signature] 4-22-42 Date

Michael J. Douma
Signature of Applicant

APPENDIX 2.

Section 116, I. R. C. reads as follows:

"SEC. 116. EXCLUSIONS FROM GROSS INCOME.

(As amended by sec. 148(a), Revenue Act of 1942.)

In addition to the items specified in section 22(b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) Foreign Resident for Entire Taxable year.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

APPENDIX 3.

Regulations 111, Sec. 29.211-2, reads as follows:

"An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances."

APPENDIX 4.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Paul Edward Swenson, Appellant, versus Kate Thomas Community Survivor of W. A. Thomas, Deceased, Appellee. No. 11923.

Appeal from the District Court of the United States for the Northern District of Texas.

(December 4, 1947.)

Before Sibley, Holmes, and McCord, Circuit Judges.

SIBLEY, Circuit Judge: Appellant Swenson paid assessed deficiencies in income taxes for the years 1943 and 1944, and his claims for refund, based on his contention that salaries earned by working in Colombia, South America, during the whole of those years, was not taxable under Section 116(a) of the Internal Revenue Code, were neglected for six months and he brought suit against the representative of the Collector. The district judge found against him and he appeals.

Prior to 1942, this exclusion from taxation of income earned abroad applied, "In the case of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year . . ." It is demonstrable from the history of that legislation that the exemption was made in the interest of foreign trade, to induce Americans to accept employment abroad and put American business on an equality with foreign competitors. In the Revenue Act of 1942, 56 Stats. Sect. 148(a), now appearing as Internal Revenue Code Section 116(a), the language was changed to read, "In the case of an individual citizen of the United States who establishes to the satisfaction of the Commis-

sioner that he was a bona fide resident of a foreign country or countries during the entire taxable year . . ." The history of this legislation shows that under the former law only simple absence from the United States anywhere or for any purpose need be shown, and for only six months and a day, to exempt the year's earned income, and by liberal construction there had been an undesirable escape from just taxation; and the change was made not because of a reversal of the original purpose to encourage foreign employment of Americans, but to so tighten the law as to require bona fide residence in a particular foreign country, or countries, and for the whole of the taxable year. The act goes on to provide that if such foreign residence has lasted for two years and return to the United States occurs during a subsequent year, the exemption may be claimed proportionally for the subsequent year although the foreign residence had not continued for all of that year. After this change Treasury Regulation 111, Sec. 29.116-1 was promulgated which directed that in general bona fide foreign residence should be determined by the principles laid down in Sections 29.211-1 to 29.211-5 as to residence by aliens in the United States. We will advert to these sections later.

The material facts as to Swenson are these. He was born in El Campo, Texas, where his mother still lives, and where he has always claimed his domicile to be. He graduated at the University of Illinois, and since 1935 has been in geophysical work. In August, 1937, he was first sent abroad to work by Geophysical Service, Inc., and was so employed for most of the time, till on August 28, 1941, he entered into a written contract with his employer to enter its foreign service for three years, for a salary, a bonus and living expenses while outside the United States. The agreement was terminable by either party on thirty

days notice. He was sent soon after to prospect for oil in Colombia, South America, in charge of a crew of laborers often numbering two hundred men. His time was mostly spent in the forests and jungles. He served the full three years there without returning to the United States, and was then asked, and consented, to extend the contract for another year. He was thus living in Colombia for the whole of four years, and during the whole of both 1943 and 1944. He expected all the time to return to the United States when the work was done, and in his application for passport stated he expected to return in three years. He paid income taxes while in Colombia to that government. No income taxes had been required of him by the United States while he was in foreign service until this controversy arose.

We think there is no evidence whatever that there was any want of good faith. Swenson did not live in Colombia to evade taxes or for any bad purpose, but only to do the work he was sent to do. We think there can be no doubt that his continuous and unbroken living there for four years was "residence." He did not change his citizenship, nor does the law contemplate that. The exemption was expressly made for citizens of the United States. The law says nothing of domicile, or changing that. Domicile is not changed by foreign residence so long as there is an intention to return home. Swenson in applying for his passport stated his domicile was in the United States and he has never changed it. But notwithstanding the fact that he established no fixed home in Colombia, or even a settled place of abode, his work requiring him

to be ever on the move, it remains true that he was always living in Colombia, attending to his business there; and that we think constitutes residence there.

The Regulation above referred to makes no difficulty. excludes "a mere transient or sojourner," and correctly. A transient means literally "one going across," or passing through. "Sojourner" is built around the French word "jour" meaning a day, and signifies a mere temporary presence or visit. The Regulation continues: "A mere fleeting intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States (or Colombia) and has no definite intention as to his stay he is a resident. One who comes to the United States (or Colombia) for a definite purpose which in its nature may be promptly accomplished he is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States (or Colombia) he becomes a resident, though it be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned." Under this elaborate explanation Swenson was a resident in Colombia, for his business was likely to require "an extended stay" and did take four years. Making his "home temporarily" in Colombia does not mean necessarily buying a house or changing his domicile. It means no more than living there temporarily, though his business requires him to move from place to place. Whether tested by the Regulation or the simple words of the statute,

no fair conclusion can be reached but that Swenson's presence in Colombia, making his living there and paying his taxes there for several years continuously, was bona fide residence.

The judgment is reversed and the cause remanded with direction to enter judgment for Swenson.

REVERSED.

A True copy:

Teste:

.....

Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No.....

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Your petitioner respectfully presents this brief in support of his petition for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit, to review the judgment of that Court rendered in the case entitled "Michael Downs vs. Commissioner of Internal Revenue."

Opinions of the Court Below.

The opinion of said Circuit Court of Appeals is unreported in Fed. 2d advance sheets but given in full in R. 95 ff. The opinion of the Tax Court is reported in 7 T. C. 1053 and printed in full in R. 60 ff.

Grounds of Jurisdiction.

The grounds of jurisdiction of your Honorable Court are fully stated in part II, paragraphs 1, 2 and 3 of the Petition for Writ of Certiorari to which this brief is attached.

Statement of the Case.

A complete statement of the case has been made in the petition under the heading I, "Summary and Short Statement of Matters Involved." (Petition, p. 2.) Therefore, in the interest of brevity and because of the fact that the petition and this brief are to be bound under a single cover, said facts of the case will not be repeated here.

Specification of Error.

Having specified in part IV of the foregoing petition the various errors made by the Ninth Circuit in its decision in conflict with the decision of the Fifth Circuit Court of Appeals in *Swenson v. Thomas,* 164 F. (2d) 783, it seems unnecessary to burden this Court with repetition of the same here.

We shall largely, therefore, confine this brief to those errors where the Court went outside the record to support its position that the facts of the *Downs* and *Hoofnel* cases "differentiate themselves from *Swenson v. Thomas*" *(supra)* [R. 107].

In addition to the errors specified in part IV of the foregoing petition for writ, the Court below erred:

1. The Court below erred in its categorical statement that "the facts in these cases (Downs and Hoofnel) differentiate themselves from the recent case of Swenson vs. Thomas, decided in the Fifth Circuit on December 4, 1947, since the instant case was submitted for decision" [R. 107].

2. The Court below further erred in going outside the record in its next and final paragraph of its opinion to support its above quoted finding by saying:

> "A strong argument can be made in support of another reason for holding that the tax exemption does not cover cases for the year 1942. The exemption provided in the statute before its amendment was intended to encourage foreign trade. Neither Hoofnel nor Downs was abroad on foreign trade; their situation had no relation to peacetime economics. Their activities were wholly those of war performed in camps of the United States Government located in a foreign country for strategic purposes under limited consent of a foreign power. In practically all but geography, petitioners were on American soil, actually under the American flag, performing services for the benefit of the American government, using materials furnished them by the American government through the American contractor—Lockheed."

Argument.

1. The similarity of the facts in the *Downs* and *Swenson* cases is clearly shown in part I of the petition to which this brief is attached and the conflict shown in part IV of the petition.

2. No argument seems necessary to show Downs was exempt from income tax on his 1942 overseas income. Respondent did not even tax him on said income. Even the Court below admits that any United States citizen absent in a foreign country for more than six months in 1942 would be exempt on his foreign earnings. (*Commissioner v. Fiske's Estate,* 128 F. (2d) 487.) There is nothing in the record that shows Downs and the other Lockheed overseas men "did nothing to encourage foreign trade" or that "their situation had no relation to peacetime economics." They may have done their bit to keep Hitler from getting all our trade worth while. And the fact is that Lockheed Aircraft now, as the public well knows, has many Constellations being serviced at a South Irish base—and is building up a large European trade.

The activities of these Lockheed overseas men were not wholly those of war in camps of the United States Government. The record clearly shows they were civilians working under a civilian contract with Lockheed. The fact is that at the Belfast base there were employed more Irish civilians, men and women, than there were Americans. Necessarily with the danger of bombing from German fliers both English and Irish (and American) civilians in these countries had to be protected by army men and anti-aircraft machine gun nests. Even as in a lesser degree the aircraft industries in this country, especially on the Pacific Coast (with its Japanese menace), had to be protected from air raids.

If the American flag flew over the Belfast base that is immaterial; it would have been a mere matter of courtesy. The record shows nothing about this. Certainly the record does not show our government planted the American flag on Irish territory.

If American materials (and men) were used as the Court says, then they were undoubtedly paid for by Lockheed and it makes no matter so far as Downs' intent is concerned, that Lockheed was in turn repaid by our government.

Conclusion.

In conclusion, petitioner submits that the real question before your Honorable Court is the conflict that exists between the decision in the *Downs v. Commissioner* case in the Ninth Circuit and in the *Swenson v. Thomas* case in the Fifth Circuit, on the meaning of the term "resident" as defined in Regulations 111, Sec. 29.211-2 thereof; and as to Downs, it seems clear that all through the year 1943, he could have "no definite intention as to his stay" in Britain and Ireland, within the clear meaning of that section. In fact, until the "Belgian Bulge" in 1944, he could not know if he would ever return.

For the reasons above assigned the petitioner prays that a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT A. WARING,
Attorney for Petitioner.

LAWRENCE M. CAHILL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 764

MICHAEL DOWNS, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Tax Court (R. 51-68) is reported at 7 T. C. 1053. The opinion of the Circuit Court of Appeals (R. 96-108) is reported at 166 F. 2d 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 27, 1948. (R. 109.) The

petition for a writ of certiorari was filed on April 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the taxpayer was a bona fide resident of a foreign country or countries during 1943, within the meaning of the applicable tax statutes and regulations, so that his salary for 1943 is exempt from income tax.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations are set out in the Appendix, *infra,* pp. 13-17.

STATEMENT

The facts as stipulated (R. 14-17) and found by the Tax Court (R. 54-60) may be summarized as follows:

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation (hereafter referred to as "Lockheed"), to employ large numbers of skilled men in the United States and transport them to the British Isles. (R.

54.) From January 1 to June 30, 1942, taxpayer was employed as an aircraft mechanic in the United States by Lockheed Aircraft corporation at Burbank, California. (R. 55.)

On April 23, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. In his application for foreign service taxpayer indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. (R. 55.) The contract (R. 19-33) which taxpayer signed provided *inter alia* that his employment would commence when he reported for duty at a point within the United States to be designated by Lockheed, at the time and place so designated, and should continue until November 1, 1942, or such later date as might be agreed upon and thereafter until sixty days after return transportation to the United States was made available by Lockheed, it being understood that such return transportation would be available on November 1, 1942, or the later date agreed upon or as soon thereafter as practicable under the circumstances then existing; that during the time that taxpayer remained at the place or places of his duty outside of the United States, Lockheed would furnish or cause to be furnished,

without cost to him, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances would reasonably permit; that taxpayer would submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as Lockheed or other medical staff at the destination or elsewhere might from time to time specify, without expense to taxpayer; that Lockheed might direct the return to the United States of taxpayer, if in its judgment taxpayer's health condition was unfavorable; and that on certain conditions Lockheed would either pay or reimburse taxpayer for all taxes lawfully levied or assessed by any foreign government against him with respect to his residence, occupation, salary, or income. (R. 55-57.)

Pursuant to the terms of his contract, taxpayer left the United States for the British Isles on June 30, 1942, and landed several weeks later in Glasgow, Scotland. (R. 57.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British Law, had to be put in use within three months from the date is was issued but the time that the holder would be allowed to stay was not mentioned therein. The visa, under British law, permitted taxpayer to remain for the purpose for

which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer was expected to depart within a reasonable time when transportation was available and subject to any extension that might be given him by the home office in London or local authorities in Belfast. (R. 58.)

After disembarking, taxpayer was first assigned to an R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed. (R. 58.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. (R. 58.) The new contract provided, *inter alia,* that the term of his employment should continue for the duration of the contract between the Government and Lockheed as extended and for such period after completion of the contract as Lockheed deemed necessary to wind up operations under the contract after termination or completion, and thereafter until return transportation to the United States for taxpayer was made available by Lockheed, which it was to obtain as promptly as practicable. (R. 58-59.)

The taxpayer remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of taxpayer's absence from the United States, his wife Eleanor[1] remained in the United States with taxpayer's three minor children and lived at the family residence in Los Angeles. (R. 59.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of $5,438.50 of which 90 percent was deposited by the corporation to the account of the taxpayer with the California Bank in Los Angeles pursuant to Article 2 of his employment contract. (R. 59-60.)

Taxpayer did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was

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[1] The Tax Court's findings of fact and opinion also cover the appeal of Eleanor J. Downs from a determination of the Commissioner asserting a deficiency due from her for 1943 computed on her income represented by one-half of the taxpayer's salary. Her case was appealed to the Circuit Court of Appeals for the Ninth Circuit, where a stipulation was made that her case is to await the final decision in taxpayer's case.

over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.)

On these facts the Tax Court, one judge dissenting without opinion, held that the taxpayer was not a bona fide resident of a foreign country in 1943 within the meaning of Section 116 of the Internal Revenue Code, as amended, and the controlling Treasury Regulations, and that consequently his salary earned during 1943 was not exempt from income tax. (R. 60-68.) The Circuit Court of Appeals affirmed.[2] (R. 96-108.)

ARGUMENT

1. The opinion of the Circuit Court of Appeals in this case is not in conflict with *Swenson* v. *Thomas,* 164 F. 2d 783 (C. C. A. 5th), as the taxpayer alleges (Pet. 13-17). The Circuit Court of Appeals pointed out (R. 107), that the facts in this case differentiate it from the *Swenson* case, and as will be shown, *infra,* the facts fully support the factual conclusion of both lower courts that the taxpayer was not a bona fide resident of a foreign country during 1943. Whether or not the correct factual inference as to Swenson's bona fide residence in Colombia was drawn by the Fifth Circuit Court of Appeals in the *Swenson* case, the same

[2] The lower court's opinion also covered the case of J. Gerber Hoofnel, who has also filed a petition for certiorari, now pending before this Court, No. 765, this Term.

finding is not compelled by the different facts in the present case.[3]

Nor does a conflict appear between the opinion in this case and that in *Swenson* v. *Thomas, supra,* in the construction and application of the controlling statute and regulation. Both decisions recognize that Section 148 of the Revenue Act of 1942, which amended Section 116 (a) of the Internal Revenue Code (Appendix, *infra*) to exempt from income tax the earned income from sources without the United States[4] of a citizen who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country"

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[3] In contrast to the facts in the case at bar, Swenson had been in the foreign service of his corporation for some years prior to 1941, at which time he made a three year contract for foreign service, which was subsequently extended for another year. He does not appear to have been engaged in work directly related to the Government's war activities, nor was he controlled in the same way as military personnel. He made his own living arrangements, for the expense of which he was reimbursed by his employer, and was not obliged to accept such living, medical, and recreational facilities as his employer provided. During his stay in Colombia, he paid income taxes to the Colombian Government. Upon facts quite similar to those in the *Swenson* case, the Tax Court recently held that an employee of the same corporation as employed Swenson and assigned to the same work group as Swenson was a bona fide resident of Colombia during 1943. See *Harvey* v. *Commissioner*, 10 T. C. 183. Although we do not concede the correctness of the *Swenson* decision, it does present a different set of facts which precludes the existence of a conflict.

[4] Section 119 (c) (3) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 119) defines "compensation for labor or personal services performed without the United States" as an item of gross income to be treated as "income from sources without the United States."

during the entire taxable year, changed the test to one of actual residence in a foreign country for the whole year, not mere physical absence from the United States for more than six months as was required for exemption from tax under the previous law;[5] and both decisions recognize that the question of bona fide residence is to be determined under Sections 29.211-2 to 29.211-5 of Treasury Regulations 111, establishing rules for determining whether aliens are bona fide residents of this country.

Contrary to taxpayer's contention, the Circuit Court of Appeals did not err in stating (R. 106)

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[5] The prior law commencing with Section 213(b)(14) of the Revenue Act of 1926, c. 27, 44 Stat. 9, exempted from tax the earned income from sources outside the United States of a citizen of the United States who was a "bona fide non-resident" of the United States for more than six months of the taxable year. The purpose of the exemption was to increase foreign trade by benefiting those employed abroad in selling merchandise of the United States (H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320); cf. S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348); H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364)). A citizen was considered a bona fide non-resident of the United States within the meaning of the law if he was physically absent from the United States for more than six months of the taxable year. See 67 Cong. Record, Part 4, p. 3781; *Commissioner* v. *Fiske's Estate*, 128 F. 2d 487 (C. C. A. 7th, certiorari denied, 317 U. S. 635; *Commissioner* v. *Swent*, 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801; S. M. 5446, V-1 Cum. Bull. 49 (1926); G. C. M. 9848, X-2 Cum. Bull. 178 (1931); G. C. M. 22065, 1940-1 Cum. Bull. 100; cf. *Carstairs* v. *United States*, (E. D. Pa.), decided January 15, 1936 (17 A. F. T. R. 1044).

that under Section 29.211-2 of Treasury Regulations 111 (Appendix, *infra*) bona fide residence in a foreign country includes the element of a temporary home in, or an identification in some degree with the customs of, that country. (Pet. 11, 15.) The regulation incorporates this concept in the provision that one whose purpose may necessitate an extended stay and who to that end "makes his home" temporarily in the foreign country may acquire a residence. See also I. T. 3642, 1944 Cum. Bull. 262. Furthermore, this concept of residence is fully in harmony with the legislative intention as to its meaning in the amended law. Statement of Senator George, Hearings before Committee on Finance, United States Senate, on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, p. 743; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54-55, 116 (1942-2 Cum. Bull. 504, 548-549, 591). Although the Fifth Circuit Court of Appeals in *Swenson* v. *Thomas, supra,* p. 785, indicated that the term "making one's home temporarily" in a country means no more than living there temporarily, the court did not hold that mere physical presence in the country would suffice; its ruling presents no square conflict with that of the Circuit Court of Appeals in this case, since Swenson identified himself with the living customs of the foreign country to some degree (see fn. 3, *supra*), whereas the taxpayer in this case was not shown to have done that at all.

2. On the facts in this case the Circuit Court of Appeals correctly affirmed the Tax Court's find-

ing that the taxpayer was not an actual bona fide resident of a foreign country during 1943 within the meaning of the regulation. The taxpayer had not previously been in foreign service for his company and he went abroad in 1942 with the intention of staying at most only so long as was necessary to carry out his contract. His employer had contracted to provide return transportation to the United States upon completion of his work and his British visa required him to leave when his work terminated. His was thus not a "mere floating intention" to return to the United States at some undetermined time, but on the contrary his intention to return was definitely fixed as to time. Although the taxpayer actually stayed abroad for about two years, he did not make "his home" temporarily in the British Isles. Instead, he used the living and recreational facilities furnished at air bases by his employer, which were similar to those afforded military personnel, retaining his family home in Los Angeles, where his wife and children resided. He made no application to become a British subject (cf. Section 29.211-4 of Treasury Regulations 111 (Appendix, *infra*) and paid no taxes to the United Kingdom. The purely transient character of his stay is emphasized by the fact that 90% of his compensation was deposited to his credit in a Los Angeles bank. These facts support, if they do not compel, the conclusion that the taxpayer was a technician temporarily away from his home, rather than a bona fide resident of a for-

eign country.[6] Cf. *Ingram* v. *Bowers*, 47 F. 2d 925 (D. C. S. D. N. Y.), affirmed on other grounds, 57 F. 2d 65 (C. C. A. 2d); *Carstairs* v. *United States*, *supra*.

Moreover, since the statute grants an exemption from taxation, it should be construed strictly against the taxpayer (*United States* v. *Stewart*, 311 U. S. 60, 71; *Pacific Co.* v. *Johnson*, 285 U. S. 480, 491). This principle confirms the correctness of the judgment in this case.

CONCLUSION

Since the judgment of the Circuit Court of Appeals is correct on the facts and is not in conflict with other decisions, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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THERON LAMAR CAUDLE,
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Special Assistants to the Attorney General.

May, 1948.

[6] In the case of employees on projects related to the war, who were sent abroad in similar circumstances, the Tax Court has consistently found that they are not bona fide residents of a foreign country. *Johnson* v. *Commissioner*, 7 T. C. 1040; *Love* v. *Commissioner*, 8 T. C. 400; *Chapin* v. *Commissioner*, 9 T. C. 142; cf. *Bouldin* v. *Commissioner*, 8 T. C. 959.

APPENDIX

Internal Revenue Code:

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [as amended by Section 148 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

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(26 U. S. C. 1940 ed., Supp. V, Sec. 116)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.116-1.[7] EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the follow-lowing conditions are met by the taxpayer claiming such exclusion from his gross income: (*a*) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (*b*) such income is from sources without the United States; (*c*) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (*d*) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether

[7] This regulation was amended by T. D. 5373, 1944 Cum. Bull. 143, 147, in respects not applicable here.

the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

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SEC. 29.211-2. DEFINITION.—A "nonresident alien individual" means an individual—

(*a*) Whose residence is not within the United States; and

(*b*) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that

end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

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SEC. 29.211-4. PROOF OF RESIDENCE OF ALIEN.—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason by his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (*a*) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (*b*) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (*c*) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the

United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (*a*) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (*b*) proof that the alien has filed Form 1078 or its equivalent, or (*c*) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (*c*) or (2) (*c*), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

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